IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WALTER TYRONE GREEN and GERTRUDE GREEN	:	**CIVIL ACTION**
v.	:	
ASSOCIATES COMMERCIAL CORPORATION; ASSOCIATES CORPORATION OF NORTH AMERICA; ASSOCIATES INSURANCE CO.; TERRCO, INC. t/a TERRCO WRECKER SALES AND SERVICE; SANDRA KOONS; ABC CORP.; XYZ CORP.; and JOHN DOES NOS. 1 THROUGH 10	:	**NO. 01-1270**

MEMORANDUM ORDER

This case arises from the repossession of a tow truck purchased by plaintiff Gertrude Green and used by her son, plaintiff Walter Tyrone Green, in his towing business. Subject matter jurisdiction is predicated on diversity of citizenship.

Plaintiffs have asserted claims for negligence, fraud, breach of contract, abuse of process, unlawful replevin, conversion and tortious interference with contract. Presently before the court is defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) all claims, except that for breach of contract, as time-barred. Defendants also assert that Walter Green lacks standing to maintain a breach of contract claim.

Dismissal for failure to state a claim is appropriate when it clearly appears that plaintiff can prove no set of facts in support of the claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. City of

Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim while accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987); Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (E.D. Pa. 1994), aff'd, 72 F.3d 318 (3d Cir. 1995). A court may also consider any document appended to and referenced in the complaint on which plaintiff's claim is based. See Fed. R. Civ. P. 10(c); In re Burlington Coat Factory Securities Litigation, 114 F.3d 1426 (3d Cir. 1997); In re Westinghouse Securities Litigation, 90 F.3d 696, 707 (3d Cir. 1996).

A complaint may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988). A claim may be dismissed as time-barred where it is clear from the complaint that the applicable statute of limitations has lapsed. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994); Cito v. Bridgewater Township Police Dep't, 892 F.2d 23, 25 (3d Cir. 1989); Elliott, Reihner, Siedzikowski & Egan, P.C. v. Pennsylvania Employees Benefit Trust Fund, 161 F. Supp. 2d 413, 420 (E.D. Pa. 2001); Jaramillo v. Experion Info. Solutions, Inc., 155 F. Supp. 2d 356, 358 (E.D. Pa. 2001).

The pertinent facts as alleged by plaintiffs are as follow.

Gertrude Green purchased two tow trucks from defendant Terrco, Inc. ("Terrco"), one on June 22 and one on August 2, 1995. On the day of each purchase, she signed a contract memorializing the sale and providing for a security interest pending full payment of the purchase price. On the same dates, Terrco assigned the contracts to Associates Commercial Corporation ("ACC") or Associates Corporation of North America ("ACONA"). Gertrude Green then purchased insurance for the tow trucks through Associates Insurance Company ("AIC").[1] From 1996 through 1998, Mr. Green made payments due under the agreements and the insurance policy to the collection manager of Associates, defendant Sandra Koons, or Terrco.

On January 5, 1998, while operating one of the trucks, Mr. Green collided into a telephone pole. The same day, he learned that the accounts with Associates were in default for non-payment, that neither vehicle was covered by insurance and that both were scheduled for repossession.

On May 8, 1998, after receiving false information from an unspecified defendant, the Philadelphia Police Department

[1] ACC maintains an office in Exton, Pennsylvania. ACONA, the parent of ACC, has headquarters in Irving, Texas, as does Associates Insurance Company. Plaintiffs refer throughout the complaint to all three corporations collectively as "Associates" without differentiation.

impounded one of the tow trucks in the belief that Mr. Green had illegally towed a car. He was arrested and prosecuted for car theft. He was ultimately acquitted.[2] By May 11, 1998 the impounded tow truck was in the Philadelphia Police impoundment lot. Shortly thereafter, the vehicle was repossessed by Associates and transported from the impoundment lot and to its control. At the time of transport, unspecified defendants removed a push bumper, arrow light stick, running boards and rooftop emergency lights from the truck. As a result of the seizure and loss of the truck, the towing business failed and lucrative contracts were lost.

Pennsylvania has a two-year statute of limitations on claims for negligence, fraud, abuse of process, unlawful replevin, conversion and tortious interference. See 42 Pa. C.S.A. §§ 5524(1); 5524(3); 5524(7).

The time to commence a tort action begins to run when an injury is sustained. Bohus v. Beloff, 950 F.2d 919, 924 (3d Cir. 1991). The statute of limitations begins to run "as soon as the right to institute and maintain a suit arises." Pocono Int'l Raceway, Inc. v. Pocono Produce, 468 A.2d 468, 471 (Pa. 1983). Lack of knowledge, mistake or misunderstanding do not toll the running of the limitations period, even though a party may not

[2] While plaintiffs do not elaborate, it appears that the District Attorney's office must have elected to proceed with the charge.

discover his injury until it is too late to afford a remedy. Id. For a claim to accrue, the plaintiff need not know the exact cause of an injury or that he has a legal cause of action. Bohus, 950 F.2d at 924-25. A party must "use all reasonable diligence to be properly informed of the facts and circumstances upon which a potential right of recovery is based and to institute suit within the prescribed statutory period." Id. See also Crouse v. Cyclops Indus., 745 A.2d 606, 611 (Pa. 2001); Cochran v. GAF Corp., 666 A.2d 245, 249-50 (Pa. 1995).

The so-called "discovery rule" tolls the running of a statute of limitations until the plaintiff knows or reasonably should know that he has sustained an injury caused by another's conduct. See Bradley v. Ragheb, 633 A.2d 192, 194 (Pa. Super. 1993). The discovery rule is a "narrow exception." Tohan v. Owens-Corning Fiberglass Corp., 696 A.2d 1095, 1200 n.4 (Pa. 1997). It is applied in "only the most limited circumstances." Dalrymple v. Brown, 701 A.2d 164, 171 (Pa. 1997). The statute is tolled only if a person in plaintiffs' position exercising reasonable diligence would not have been aware of the salient facts. See Baily v. Lewis, 763 F. Supp. 802, 806 (E.D. Pa.), aff'd, 950 F.2d 721 (3d Cir. 1991).

"There are very few facts which cannot be discovered through the exercise of reasonable diligence." Vernau v. Vic's Market, Inc., 896 F.2d 43, 46 (3d Cir. 1990). See also Urland by

and through Urland v. Merrell-Dow Pharms, Inc., 822 F.2d 1268, 1273 (3d Cir. 1987). Once plaintiff is aware of the salient facts, his failure to investigate or to exercise reasonable diligence in the investigation will not prevent the statute of limitations from running. See O'Brien v. Eli Lilly & Co., 668 F.2d 704, 710 (3d Cir. 1981). A plaintiff cannot evade a statute of limitations simply by stating that he only learned of events underlying his claim outside of the statutory period, or courts would never be able to dismiss claims which are clearly time barred. See LRL Properties v. Portage Metro Housing Authority, 55 F.3d 1097, 1107 n.5 (6th Cir. 1995).

Plaintiffs were clearly aware of all of the events underlying their claims by mid-May of 1998 and yet did not initiate suit until almost three years later. Despite the suggestion in their brief to the contrary, with the exercise of any diligence plaintiffs would have had to be aware that the injuries complained of were caused by the conduct of defendants.

If one is declared in default despite making timely payments, it is difficult to discern who could have been negligent or otherwise at fault but the party to whom payments were due. If one is uninsured despite making timely premium payments, it is difficult to discern who could have been negligent or otherwise at fault but the party which was obligated to provide insurance in return for the payments. With any

diligent inquiry at all, plaintiffs would have known that the tow truck was repossessed by the Associates entity which had a security interest in it. It is inconceivable that with any diligence, plaintiffs would not know who reported a theft to the police which resulted in a public prosecution.[3]

Plaintiffs' tort claims are time barred.

The parties agree that Mr. Green was not a party to the pertinent contract. Plaintiffs contend, however, that Mr. Green was a third-party beneficiary of the contract between Ms. Green and Terrco.

A third-party beneficiary has standing to recover in contract only where both parties to the contract express an intention to benefit the third party in the contract itself, or the circumstances compel a recognition of the beneficiary's right to effectuate the intention of the parties and indicate that the promisee intended to give the beneficiary the benefit of the promised performance. See Scarpitti v. Weborg, 609 A.2d 147,

[3] Moreover, plaintiffs have failed to state a claim for abuse of process at all. They have alleged no facts from which it appears that any defendant perverted legal process after it was issued to achieve an objective for which the process was not intended. See McGee v. Feege, 535 A.2d 1020, 1023 (Pa. 1987); Al Hamilton Contracting Co. v. Cowder, 644 A.2d 188, 191 (Pa. Super. 1994). That process is initiated maliciously or with an ulterior motive does not give rise to a claim for abuse of process. See id. at 192. See also Shiner v. Moriarity, 706 A.2d 1228, 1236 (Pa. Super. 1998).

150-51 (Pa. 1992). See also Restatement (Second) of Contracts § 302 (1979).

The contract itself contains no indication that Mr. Green was an intended beneficiary. It appears, however, that Mr. Green did assume the benefits and obligations of the contract. It is conceivable that plaintiffs can produce evidence to show that at the time of contracting both parties intended that Mr. Green be a beneficiary of the contract. If not, the issue can be revisited at the summary judgment stage.

ACCORDINGLY, this day of March, 2002, upon consideration of defendants' Motion to Dismiss (Doc. #4) and plaintiffs' response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and all claims herein, except plaintiffs' claim for breach of contract, are **DISMISSED**.

BY THE COURT:

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JAY C. WALDMAN, J.